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No. 79-1717

IN THE

Supreme Court of the United States

October Term, 1979

WRITERS GUILD OF AMERICA, WEST, INC., *et al.*,
Petitioners,

vs.

AMERICAN BROADCASTING COMPANIES, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITIONERS' REPLY BRIEF.

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ARGUMENT

1. Prompt Judicial Scrutiny Of The First Amendment Violation Was Essential.

The Petition showed conclusively that the holding of the Court of Appeals directly conflicts with this Court's requirement of prompt judicial review of alleged restraints on speech.[1] Respondents cite no authority to rebut that position.

Respondents argue, however, that there is "no continuing constitutional violation. . . ."[2] But, the reason there is now

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[1]Pet. at 18. Hereinafter, the Petition will be cited as "Pet. at ...," Private Respondents' Opposition as "Private Opp. at ...," and Federal Respondents' Opposition as "Federal Opp. at ....."

Federal Respondents' statement that the district court "withheld the injunctive remedy," Federal Opp. at 11 n.4, mischaracterizes the record. That court held an expedited procedure, *see* note 15 *infra*; it did not grant an injunction in its final order only because the FCC disclaimed any intention to enforce the Family Viewing Policy and because the district court did "not believe that the Commission will soon venture again on a lawless course." 423 F.Supp. at 1155-57, App. at A-228-A-231.

[2]Private Opp. at 20.

no continuing constitutional violation is that the district court declared that the Family Viewing Policy violates the First Amendment and the Administrative Procedure Act ("APA"). The NAB suspended enforcement *after* the district court's judgment.[3] Accordingly, the issue of whether the district court had jurisdiction to declare the Family Viewing Policy unconstitutional is properly before this Court. It is well-established that voluntary cessation of unlawful conduct, particularly when timed to blunt the force of a lawsuit, does not justify a refusal to review the merits or to enter appropriate equitable relief.[4]

Respondents also imply that if there is no reference to the FCC, the FCC will be unable to consider the constitutional issues in this case.[5] Petitioners have never denied that in appropriate cases the FCC can and should state its views on First Amendment issues before it. It does not follow, however, that when the FCC has acted, and the consistency of its action with the First Amendment has been put into question, a district court should first refer the matter to that agency before considering the constitutionality of the FCC's action.[6] The Court of Appeals' decision requires district

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[3]Private Opp. at 23.

[4]*See, e.g., United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953).

[5]Private Opp. at 15-16, 17-18; Federal Opp. at 13-14, 15-16.

[6]Such reference is particularly inappropriate where the FCC is well situated, as a party to the lawsuit, to express its views. Respondents assert that the district court could not rely in the FCC's counsel's statements at trial. Federal Opp. at 15; Private Opp. at 21. Thay are wrong. This case is no different from any other case in which counsel's admissions are binding on the client. *Glick v. White Motor Co.*, 458 F.2d 1287, 1291 (3d Cir. 1972). Respondents rely on *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156 (1962) and its progeny. Those cases are totally inapposite. In them, appellate counsel attempted belatedly to explain agency action for which the agency had given no reasons or reasons other than those stated on appeal. *E.g., Burlington Truck Lines, Inc. v. United States, supra*, 371 U.S. at 169; *CBS v. FCC*, 454 F.2d 1018, 1026-7 (D.C. Cir. 1971). Here, in contrast, the FCC's trial counsel conducted a vigorous and lengthy defense over a period of many months, often reiterating definite positions on behalf of the agency.

courts to permit unconstitutional agency action to continue while the very agency which took the action considers the constitutionality of its own conduct. This cannot be the law.[7]

Private Respondents' reliance on *CBS v. DNC*[8] is misplaced. *CBS v. DNC* did not even deal with the question of reference to the FCC. While this Court reaffirmed that the FCC has expertise in the constitutional questions presented in that case, it did so in a review of an FCC action, precisely what Petitioners requested in this case. Nothing in *CBS v. DNC* suggests that this Court would permit, much less require, the result ordered by the Ninth Circuit in this case.[9]

2. The Court Of Appeals' Final Decision On The Issue Of Primary Jurisdiction Is Ripe For Review By This Court.

There is absolutely no merit to Private Respondents' contention that the Court of Appeals' decision is not final and

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[7]Courts have routinely ruled on constitutional claims in the broadcast area without requiring FCC review of those claims. *See, e.g., Massachusetts Univ. Conv. v. Hildreth & Rogers Co.*, 183 F.2d 497, 500-01 (1st Cir. 1950); *McIntire v. Wm. Penn Broadcasting Co.*, 151 F.2d 597, 600-01 (3d Cir. 1945), *cert. denied*, 327 U.S. 779 (1946); *Ackerman v. Columbia Broadcasting System, Inc.*, 301 F. Supp. 628, 634 (S.D.N.Y. 1969).

[8]412 U.S. 94 (1973).

[9]Respondents also make two patently false statutory arguments. First, they argue that Section 405 of the Communications Act, 47 U.S.C. § 405, requires that the FCC reconsider the actions it took. Private Opp. at 16 n.47, 18; Federal Opp. at 15 n.8. However, that section applies to actions taken in any "proceeding." Here, Petitioners complained that the FCC acted informally and wholly outside any formal proceeding. Thus, Section 405 is inapplicable.

Second, contrary to Respondents' argument, Private Opp. at 22, Section 402(a) of the Communications Act, 47 U.S.C. § 402(a), does not vest exclusive jurisdiction to review FCC "actions" in the courts of appeals. Section 402(a) applies only to "orders," not all actions. *See* 423 F.Supp. at 1079, App. at A-70-A-72. Here, Petitioners do not complain of FCC orders. Section 10(b) of the APA, 5 U.S.C. § 703, thus permits review in "any applicable form of legal action. . . ."

therefore not ripe for review. Indeed, because of the fundamental nature of the issue of law involved in the Ninth Circuit's decision, even were that decision "non-final," it would be appropriate to grant the Petition.[10]

Private Respondents argue that the Ninth Circuit's decision "is clearly interlocutory, and many complex issues remain to be decided."[11] In fact, the district court entered a final judgment in the *Writers Guild* case as to all issues involving the First Amendment, the Communications Act and the APA.[12] Similarly, in the *Tandem* case the district court finally resolved all questions except for the amount of damages for the First Amendment violation.[13]

To be sure, the Ninth Circuit's decision on primary jurisdiction requires the district court to refer the claims against Federal Respondents to the FCC.[14] If the Ninth Circuit's decision stands, further proceedings will be required. But to assert that such an order makes the decision of the Court of Appeals an "interlocutory judgment" is to prove too much. Under that analysis, every case involving a remand with directions to the district court will be "clearly interlocutory," regardless of the final nature of the original

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[10]*See, e.g., United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945) (ruling "fundamental to the further conduct of the case").

[11]Private Opp. at 23.

[12]423 F. Supp. at 1161-62, App. at A-240-42.

[13]423 F. Supp. at 1161-62, App. at A-240-42. Federal Respondents go a step further than Private Respondents and suggest that all of the appeals before the Ninth Circuit were "interlocutory." Federal Opp. at 6 n.3. That argument is based on a significant distortion of the record.

All appeals to the Ninth Circuit in the *Writers Guild* action were from the final judgment of the district court. Jurisdiction was based on 28 U.S.C. § 1291, governing appeals from such "final decisions." Similarly, although Private Respondents filed an interlocutory appeal in the *Tandem* case, in that action the district court directed entry of a *final* judgment as to the *federal* defendants. The Government's notice of appeal in *Tandem*, filed on or about April 27, 1977, was from "the final judgment entered in this action. . . ."

[14]609 F.2d at 366, A-25.

district court judgment. The discretionary practice of denying interlocutory review was not intended to apply in all such cases.[15]

If Respondents' position were accepted, Petitioners would be forced to endure a full-scale FCC inquiry and a second appeal before this Court could determine if reference was appropriate. It surely stands the interlocutory appeal doctrine and the primary jurisdiction doctrine, both intended to promote economy, on their heads to require such a convoluted procedure.[16]

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[15]*See, e.g., Greene v. United States*, 376 U.S. 149 (1964) (Court of Claims order suspending court proceedings pending exhaustion of administrative remedies reviewed and reversed).

[16]Private Respondents also argue that any delay in the resolution of the merits is Petitioners' own fault because they "chose not to pursue" a preliminary injunction. Private Opp. at 24. In constructing this argument, Private Respondents have misstated the record. At all times Petitioners stressed the urgency of this case and sought immediate relief by way of a preliminary injunction. The district court also recognized the importance of a rapid resolution of the merits. Accordingly, pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure, the district court ordered the trial of the action on the merits to be advanced and consolidated with the hearing on Petitioners' application for a preliminary injunction. The statement that Petitioners "chose not to pursue" that remedy is simply false.

CONCLUSION.

For the foregoing reasons Petitioners request this Court to grant the Petition.

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Respectfully submitted,

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